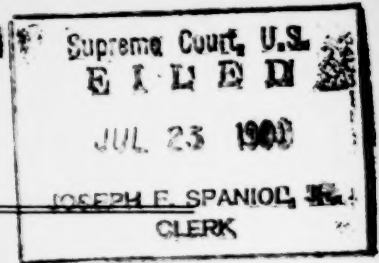


89-161



No. \_\_\_\_\_

In The  
**Supreme Court of the United States**  
October Term, 1990

MPM CONTRACTORS, INC.,

*Petitioner,*

v.

DEPARTMENT OF HEALTH AND ENVIRONMENT  
OF THE STATE OF KANSAS,

*Respondent.*

Petition For Writ Of Certiorari To The  
Court Of Appeals Of The State Of Kansas

PETITION FOR CERTIORARI

JOHN S. SEEBER  
Counsel of record  
ADAMS, JONES, ROBINSON AND  
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## QUESTION PRESENTED

Whether due process of law hearings under the Fifth and Fourteenth Amendments to the United States Constitution were denied where a state agency head without any notice or hearing signed orders fining as asbestos removal contractor for alleged state regulatory violations, then allowed appeals hearings on the orders before an employee of the agency head, and the agency head then signs further orders for the fines solely based upon a review of the appeal hearing by the agency head's general counsel.

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No. \_\_\_\_\_

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MPM CONTRACTORS, INC.,\*

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DEPARTMENT OF HEALTH AND ENVIRONMENT  
OF THE STATE OF KANSAS,

*Respondent.*

---

**Petition For Writ Of Certiorari To The  
Court Of Appeals Of The State Of Kansas**

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**REPORTS OF OPINIONS**

There are no official or unofficial reports of opinions delivered in the case by other courts or administrative agencies.

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\* There is no parent or subsidiary company of MPM Contractors, Inc.

## JURISDICTION

The date of the entry of the judgment or decree sought to be reviewed was March 9, 1990 in the Court of Appeals of the State of Kansas, reprinted as Appendix A. Petition For Review thereof was denied by the Supreme Court of the State of Kansas April 24, 1990, by order reprinted as Appendix B.

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## STATUTORY PROVISION

The statutory provision believed to confer jurisdiction on this court to review the judgment or decree in a question by writ of certiorari is 28 U.S.C. § 1257.

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## CONSTITUTIONAL PROVISIONS

The constitutional provisions involved under the Constitution of the United States of America are:

### AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

U.S. Const. amend. V

### AMENDMENT [XIV], Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1

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### STATEMENT OF THE CASE

This case involves fines of \$2,000, \$3,000, and \$4,000, assessed against petitioner, MPM Contractors, Inc. ("MPM" herein), by Stanley C. Grant, Ph.D., Secretary of the Kansas Department of Health and Environment ("KDHE" herein) in three cases under the Kansas Asbestos Control Act, which cases were consolidated on judicial appeal. All material documents and procedures in the cases are identical and accordingly only documents concerning one of the cases will be referred to.

Each fine case was started by an "ORDER ASSESSING A CIVIL PENALTY" signed by Stanley C. Grant, and a copy of one order is reprinted as Appendix C. Stanley C. Grant, Secretary of the Kansas Department of Health

and Environment, is the agency head of the Kansas Department of Health and Environment. As the agency head, under K.S.A. 77-526, it was a final order as rendered by the agency head.

The "ORDER ASSESSING A CIVIL PENALTY" stated the Secretary had reviewed the files and made the findings of fact and law therein; found violations of certain asbestos control regulations against MPM; assessed the fines in the three separate amounts; and had a separate section entitled "Appeal Right" that if MPM thought the order unreasonable, MPM could appeal the order by stating specifically in what way the order was unlawful or unreasonable in a written notice to the Secretary within 15 days, with the failure to submit an appeal waiving a right to a hearing and the order would become final, and reflecting if an appeal request was made, Jack Alexander of the Kansas Department of Health and Environment was appointed presiding officer. Jack Alexander is an employee of the KDHE. It was stipulated the Secretary provided no notice or opportunity for hearing to MPM prior to signing and issuing such orders and did not personally review the relevant agency administrative files and records on which it was based before signing and issuing the same (Appendix D). Agency employees prepared such orders and Secretary Grant signed them when placed in front of him without any presentation being made to him.

MPM "appealed" the "ORDER ASSESSING A CIVIL PENALTY."

Stanley C. Grant, KDHE agency head, then sent a "NOTICE OF HEARING" to MPM (Appendix E herein)

incorporating the previous "ORDER ASSESSING A CIVIL PENALTY" and offering an opportunity for MPM to be heard, appointed Jack Alexander of KDHE as hearing officer; stated MPM would have an opportunity to present evidence "as to why the civil penalty should not be imposed" (Appendix E at App. 17); stated the issues in the administrative hearing "is whether the violations contained in the attached Order Assessing a Civil Penalty are correctly stated facts that warrant the assessment" (Appendix E at App. 18) of the penalty; if the company didn't attend or participate, the order may issue assessing the penalty.

At the hearing held on the \$3,000 fine, the hearing officer, Jack Alexander, stated "I am here to hold a hearing to allow you gentlemen to convince me that the information from this side of the table is in error. It's the only issue in front of me, do we understand that?"

After the appeals hearings, Jack Alexander signed a "REPORT OF HEARING OFFICER" (Appendix F herein) stating the fine imposed " . . . is hereby sustained." (Appendix F at App. 32).

The "REPORT OF HEARING OFFICER" was appealed to Stanley C. Grant, Ph.D., Secretary of KDHE by MPM, with oral argument requested. Oral argument was denied by the Secretary and the Secretary entered a "FINAL ORDER" (Appendix G herein) and an eventual "CORRECTION OF FINAL ORDER," (Appendix H herein). The final order and its correction first adopted the civil penalty of \$4,000 imposed by the initial order and then made a correction to the \$3,000 in the initial

order. In signing and issuing the final orders and correction of final order, it was stipulated the Secretary relied on the independent legal advice of his general counsel who reviewed the relevant administrative files, transcripts, exhibits, and records, and prepared the final orders and correction; the Secretary did not personally review the administrative files or records before signing the final orders and correction of final order (Appendix D herein).

MPM appealed the final orders to the Shawnee County District Court in Kansas by Petitions For Judicial Review. The Petitions For Judicial Review included that the proceedings were null and void and deprived MPM of life, liberty, or property without due process of law under the Fifth and Fourteenth Amendments to the United States Constitution (Appendix I herein).

The Shawnee County District Court in its Memorandum Decision and Order which is Appendix J hereto reversed the fines because of the failure to hold a hearing under the Kansas Administrative Procedures Act prior to the "ORDER ASSESSING A CIVIL PENALTY" and found that the procedure used was the form of an appeal from the issuance of such orders which had assessed the penalties (Appendix J at App. 45). The Shawnee County District Court denied the issues raised concerning the Fifth and Fourteenth Amendments to the United States Constitution which had been raised by MPM (Appendix J at App. 46).

KDHE appealed the Shawnee County District Court Memorandum Decision and Order to the Kansas Court of Appeals. MPM cross-appealed from the Shawnee County,



Kansas District Court not including in its reasons for finding in favor of MPM that the acts violated the Fifth and Fourteenth Amendments to the Constitution of the United States (Appendix K herein).

MPM in its Brief of Appellee and Cross-Appellant to the Court of Appeals of the State of Kansas raised and brief the following issue: Whether the fines deprive MPM Contractors, Inc. of property without due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

The Court of Appeals of the State of Kansas in its Opinion March 9, 1990 (Appendix A) reversed the Shawnee County District Court on the issues raised on Kansas law and reinstated the penalties, and discussed and denied the due process of law issues raised by MPM in its cross-appeal (Appendix A at App. 5-7). The Supreme Court of the State of Kansas, on April 24, 1990, denied MPM's petition for review of said Court of Appeals opinion (Appendix B at App. 8).

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### REASONS AND ARGUMENTS FOR ALLOWANCE OF THE WRIT

The Court should allow the writ for the reason that the Court of Appeals of the State of Kansas has decided federal constitutional questions concerning the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution in a way that conflicts with the applicable decisions of this Court in that MPM was not accorded the due process right to be heard at a meaningful time and in a meaningful manner under the

principles set forth by this Court in *Armstrong v. Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965).

MPM was fined by an "ORDER ASSESSING A CIVIL PENALTY" that amounted to a final order by the agency head of KDHE without any hearing or notice of any kind and based on an order drafted by personnel in the agency and simply placed in front of the Secretary for his signature. MPM was given a "appeal" right of trying to disprove that order with the burden cast upon MPM rather than have a fundamentally fair hearing at a meaningful time and in a meaningful manner. An appeal hearing held before an employee of the agency head who had already issued the order is not a meaningful hearing at a meaningful time; and an appeal hearing by anyone of the order of the agency head is not a required due process hearing under the Fifth and Fourteenth Amendments to the United States Constitution. The Secretary's general counsel reviewed the appeals and the Secretary again signed a final order placed in front of him without any knowledge of the matter or a due process hearing.

In *Armstrong v. Manzo*, 380 U.S. 545, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965), the divorced mother of a child and her second husband obtained an order without notice and hearing from a juvenile judge in Texas that the child's father had not contributed for support for a period of time that allowed the juvenile court judge to consent to the adoption, and based thereupon a separate adoption proceeding in a Texas district court occurred, also without notice or hearing to the child's father. The day the adoption decree was entered, the new adoptive father gave notice to the child's grandfather who in turn notified the father, who immediately filed a motion to set

aside the adoption and for a new trial. The district court judge who had granted the adoption had a hearing on the motion for a new trial and heard evidence only as to the support contributions by the father and denied a new trial, which decision was affirmed by the Supreme Court of Texas. This Court reversed the case because of the lack of due process of law and in doing so this Court indicated at 380 U.S. p. 551 that with a timely notice that the Constitution required, the child's mother and her second husband would have had the burden of proving their case against whatever defenses the petitioner might have interposed and stated:

"Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' *Speiser v Randall*, 357 US 513, 525, 2 L ed 2d 1460, 1472, 78 S Ct 1332. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis v. Ordean*, 234 US 385, 394, 58 L ed 1363, 1369, 34 S Ct 779. *It is an opportunity which must be granted at a meaningful time and in a meaningful manner.* The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the

case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." (Emphasis supplied.)

The instant MPM case is similar because on the "appeal" they were faced with the task of overcoming on appeal the order which by law was already a final order by the agency head assessing the fines. The unlawful burden would have been the same even if the hearing officer had not been an employee of the Secretary because the Secretary eventually upheld the appeal with another order signed without hearing before him, and hence there was never an opportunity for hearing "at a meaningful time and in a meaningful manner" as required.

Petitioner is aware of no published statistics on the number of similar cases in which similar procedures are used by state agencies of the various states with respect to asbestos control matters and fines, but at the oral argument before the Kansas Court of Appeals, counsel for KDHE stated that this was the way these matters were handled all over the country based on seminars they attended. Based upon that argument, it appears there may be a large volume of these cases where there is no meaningful hearing being afforded.

This is an important constitutional issue because it goes to a basic constitutional right and an attempt to destroy the right to a due process hearing at a meaningful time and manner at which both sides of the playing field are level, so to speak, and the slate is clean, by allowing an "appeal" hearing on an order entered without any notice or hearing.

---

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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*Attorneys for MPM  
Contractors, Inc.*



App. 1

**APPENDIX A**

NOT DESIGNATED FOR PUBLICATION

No. 63,714

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MPM CONTRACTORS, INC.,  
*Appellee/Cross-Appellant,*

v.

DEPT. OF HEALTH AND ENVIRONMENT  
OF THE STATE OF KANSAS,  
*Appellant/Cross-Appellee.*

MEMORANDUM OPINION

Appeal from Shawnee District Court; FRED S. JACKSON, judge. Opinion filed March 9, 1990. Affirmed in part and reversed in part.

*Yvonne C. Anderson*, of Kansas Department of Health and Environment, for appellant/cross-appellee.

*John S. Seeber*, of Adams, Jones, Robinson and Malone, Chartered, of Wichita, for appellee/cross-appellant.

Before BRISCOE, P.J., GERNON and LEWIS, JJ.

*Per Curiam*: The Kansas Department of Health and Environment (KDHE) appeals the district court's order which vacated penalties issued against MPM Contractors, Inc., (MPM) in four cases. MPM cross appeals.

MPM is a licensed asbestos contractor. KDHE found that MPM had failed to comply with regulations governing the removal of asbestos. Recommendations were submitted to the Secretary of KDHE in the form of

## App. 2

documents entitled "ORDER ASSESSING A CIVIL PENALTY" for review and decision.

This appeal centers not on the substance of the findings, but rather on the nature of the penalties and the procedures leading to the decision by the Secretary.

The Secretary assessed penalties against MPM. MPM then filed for judicial review, at which time the cases were consolidated. The district court issued findings and an order setting aside the orders of KDHE. KDHE appeals.

### Scope of Review

Appellate review of administrative cases is governed by the Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et seq.* The scope of review is set out in K.S.A. 77-621, which provides that "[t]he burden of proving the invalidity of agency action is on the party asserting invalidity." K.S.A. 77-621(a)(1).

The Kansas Supreme Court has stated:

"If agency action is constitutionally authorized by statute, it is presumed valid on review unless it is not supported by substantial competent evidence and is so wide of its mark as to be outside the realm of fair debate, or is otherwise unreasonable, arbitrary, or capricious and prejudices the parties." *Zinke & Trumbo, Ltd. v. Kansas Corporation Comm'n*, 242 Kan. 470, Syl. ¶ 1, 749 P.2d 21 (1988).

"In reviewing the district court's judgment, this court must first determine whether the district court observed the requirements and restrictions placed upon it, and



### App. 3

then make the same review of the administrative tribunal's action as does the district court." *Kansas Dept. of Health & Environment v. Banks*, 230 Kan. 169, 172, 630 P.2d 1131 (1981).

### District Court Findings

The district court found that the civil penalties assessed by KDHE were imposed without notification and contrary to K.S.A. 65-5314 and 77-508 and therefore KDHE exceeded its scope of authority.

### Statutes

K.S.A. 77-508 states:

"A hearing shall not be required for a decision:

"(a) To issue or not to issue a complaint, summons or similar accusation; or

"(b) to initiate or not to initiate an investigation, prosecution or other proceeding before the state agency, another agency or a court."

Asbestos control law is found in Article 53 of Chapter 65 of Kansas Statutes Annotated. K.S.A. 65-5314 states in part:

"(b) The secretary, upon a finding that a business entity has violated any provision of this act or any rules and regulations adopted under this act, may impose a civil penalty within the limits provided in this section upon such business entity, which civil penalty shall be in an amount to constitute an actual and substantial economic deterrent to the violation for which the civil penalty is assessed.

## App. 4

"(c) No civil penalty shall be imposed under this section except upon the written order of the secretary after notification and hearing, if a hearing is requested, in accordance with the provisions of the Kansas administrative procedure act."

### The Order

The first order, due to the unfortunate choice of words by its author, and because of its style, appears upon first reading to be a final determination of the issues. It is titled, "ORDER ASSESSING A CIVIL PENALTY." It states that the Secretary "makes the following findings of fact and law." Further, it states, "The Secretary having found . . . hereby assesses." It has a section entitled "APPEAL RIGHT."

Upon closer review of the order's language, it is clear that the order is not a final determination of the issues. The order contains clear and unambiguous language that if MPM does not request a hearing then "this ORDER ASSESSING A CIVIL PENALTY will become a Final Order." This language, in our view, saves the order from being a final order and requires that this matter be reversed.

The order is within the exceptions to K.S.A. 77-508. The effect of this order is to provide notice to the respondent that KDHE has reason to conclude that violations of the Asbestos Control Act have occurred, that the respondent is responsible for the violations, that penalties will be imposed if the order becomes a final order, and that the order will become final unless the respondent takes

## App. 5

action. K.S.A. 65-5314 clearly states that a hearing is *not* required unless requested.

The Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et seq.*, defines a nonfinal agency action as "the whole or a part of an agency determination, investigation, proceeding, hearing, conference or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural or intermediate with regard to subsequent agency action of that agency or another agency." K.S.A. 77-607(b)(2).

We conclude that the agency did not exceed its scope of authority in issuing the order and reverse the district court's finding that penalties were assessed by KDHE without notice and contrary to the applicable statutes.

### Cross-Appeal: Due Process

In its cross-appeal, MPM contends it was deprived of a trial by a jury, and that the penalties deprive MPM of property without due process of law. We reject both parts of MPM's cross-appeal.

The Sixth Amendment requires jury trials in criminal cases. The Seventh Amendment permits jury trials "in suits at common law, where the value in controversy shall exceed twenty dollars."

In Davis, Administrative Law Text § 8.11 (3d ed. 1972), Davis writes, "Administrative agencies do not impose criminal penalties, and proceedings before agencies are not suits at common law."

## App. 6

There is no constitutional guarantee which gives a right to a jury trial to any class of case which did not exist when the constitution was adopted. *Ford v. Environmental Protection Agency*, 9 Ill. App. 3d 711, 719, 292 N.E.2d 540 (1973).

The Asbestos Control Act is a creation of statutory law and did not exist prior to 1985. We find no merit to MPM's assertion on this point.

MPM further argues that the procedures used deprived it of property without due process of law and violated the separation of powers doctrine.

In *Barnes v. Kansas Dept. of Revenue*, 238 Kan. 820, 714 P.2d 975 (1986), the Kansas Supreme Court stated, "The constitutional guarantee of procedural due process has always been understood to embody a presumptive requirement of notice and a meaningful opportunity to be heard . . . before the State acts finally to deprive a person of his property." 238 Kan. at 824. (Emphasis added).

In *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 94 L. Ed. 1081, 70 S. Ct. 820, reh. denied 340 U.S. 857 (1950), the United States Supreme Court stated, "[I]t is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." 339 U.S. at 599. (Emphasis added).

The specific due process arguments of MPM have been raised, discussed, and rejected by the Kansas Supreme Court in *Pork Motel, Corp. v. Kansas Dept. of*

App. 7

*Health & Environment*, 234 Kan. 374, 673 P.2d 1126 (1983).

The court stated:

"The legislature has by statute charged the secretary of KDHE with specific duties to protect the health and environment of the citizens of this state. . . .

. . . .

"[T]he secretary has power to adopt, amend and repeal rules and regulations . . . issue such orders as may be necessary . . . [, and] enforce such orders by appropriate administrative and judicial proceedings. . . . " 234 Kan. at 379.

The United States Supreme Court has held that the combination of investigating and judging functions in an agency does not violate due process. *Withrow v. Larkin*, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975).

The legislature has the power, without question, to delegate such a dual role to an agency. *In re Larsen*, 17 N.J. Super. 564, 86 A.2d 430 (1952).

The only other issue to be noted is the contention that a KDHE employee presided at the administrative hearings, depriving MPM of an impartial hearing officer. MPM waived this issue by failing to file timely motions for disqualification pursuant to K.S.A. 77-514. We note, however, that an identical challenge in the *Pork Motel* case was rejected.

We find no merit to any issue raised by MPM on cross-appeal and affirm all issues raised on cross-appeal.

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App. 8

**APPENDIX B**  
**IN THE SUPREME COURT OF THE**  
**STATE OF KANSAS**

MPM CONTRACTORS, INC.	)	
	)	
v.	)	
DEPARTMENT OF HEALTH AND	)	No. 89-63714-A
ENVIRONMENT OF THE STATE	)	
OF KANSAS	)	
<hr/>		

You are hereby notified of the following action taken in  
the above entitled case:

PETITION FOR REVIEW

DENIED

Date April 24, 1990

Yours very truly,

LEWIS C. CARTER  
*Clerk, Supreme Court*

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APPENDIX C

BEFORE THE KANSAS DEPARTMENT  
OF HEALTH AND ENVIRONMENT

In the Matter of Violation of Asbestos  
Control Regulations by MPM Contractors,  
Incorporated, its Successors or Assigns,  
215 South Pattie, Wichita, Kansas 67201 Case No. 87-E-83

ORDER ASSESSING A CIVIL PENALTY

The Secretary of Health and Environment (Department) after reviewing the administrative files in this matter and being fully and duly advised makes the following findings of fact and law:

1. MPM Contractors, Incorporated (Firm) notified the Department on June 29, 1987, that the Firm would be engaged in an asbestos abatement project at Unified School District Number 328, Quivira Heights Grade School, Holyrood, Kansas. This asbestos abatement project was originally to commence on July 18, 1987; however, due to delays was not started until late July. The notification listed the work practices for this project to be the procedures specified in K.A.R. 28-50-9(a) and K.A.R. 28-50-9(c) Work Practices for Asbestos Removal Projects in Areas to be Reoccupied.
2. On August 21, 1987, Mr. Russell Brichacek of the Department conducted a compliance inspection at Quivira Heights Grade School. The Department representative contacted Mr. Kenneth Parks, Principal, and was advised that the contractor had just completed the project. The Department representative then inspected the school and observed the following conditions:
  - a. In the Boys' Locker Room, debris was observed on the top of the shorter set of lockers. A sample of the debris was collected (Sample ET 87-586) and the area photographed (Quivira Heights



## App. 10

Grade School photograph # 1). Subsequent analysis in the Department's laboratory showed the debris contained 35% chrysotile asbestos. The work practices to be used in this area were to be performed under the provision of K.A.R. 28-50-9(c).

- b. Also in the Boys' Locker Room, a residue material was observed on the pipe at the wall entry into the shower area. A sample of the material was collected (Sample ET 87-587) and a photograph taken (Quivira Heights Grade School photograph # 2). The laboratory analysis indicated the material contained 50% chrysotile asbestos. The work practices that were to be used in this area were identical to those as described in paragraph 2a. of this Order.
  - c. In the boiler room, debris was observed on the pressure gauge panel. A sample of this material was collected (Sample ET 87-588) and the area photographed (Quivira Heights Grade School photograph # 3). The laboratory analysis indicated the material contained 15% chrysotile and 30% amosite asbestos. The work practices to be used in this area were to be performed under the provisions of K.A.R. 28-50-9(a).
3. Subsection (c)(4) of K.A.R. 28-50-9 specifically requires that while using glove bags, airtight seals shall be continuously maintained until the pipe surface that is enclosed within the glove bag has been cleaned free of all visible residue. The findings summarized in paragraph 2(b) of this Order indicate that the pipe located in the Boys' Locker Room was not cleaned free of all visible asbestos residue as required by K.A.R. 28-50-9(c)(4).
  4. Subsection (c)(7) of K.A.R. 28-50-9 specifically requires that at the completion of the project, the work area shall be free of all visible asbestos containing debris, including accumulations that existed prior to the start of the project. Findings in paragraph 2(a)



## App. 11

of this Order indicate that the work area in the Boys' Locker Room was not cleaned free of all visible asbestos containing debris as required by K.A.R. 28-50-9(c)(7).

5. Subsection (a)(9) of K.A.R. 28-50-9 specifically requires that after the plastic sheeting has been removed, all previously covered surfaces in the work area shall be cleaned free of all visible debris. Findings in paragraph 2(c) of this Order indicate that the work area in the boiler room was not cleaned free of all visible asbestos containing debris as required by K.A.R. 28-50-9(a)(9).
6. In consideration of the aforementioned facts, the Department finds that on August 21, 1987, MPM Contractors, Incorporated violated certain requirements of K.A.R. 28-50-9(c)(4) in that the pipe in the Boys' Locker Room had not been cleaned free of visible residue while within the glove bag; K.A.R. 28-50-9(c)(7) in that the Boys' Locker Room, where glove bags had been utilized, had not been cleaned free of all visible asbestos containing debris; and K.A.R. 28-50-9(a)(9) in that the surfaces in the boiler room had not been cleaned free of all visible debris.
7. The Secretary of Health and Environment finds that MPM Contractors, Incorporated has violated K.A.R. 28-50-9, subsection (c)(4), (c)(7), and (a)(9).
8. In accordance with the provisions of K.S.A. 65-5314, any business entity which violates any provisions of this act or any rules or regulations adopted thereof is subject to a fine not to exceed \$5,000 for each violation. Each day the violation continues shall constitute a separate offense.

## ORDER

The Secretary having found that MPM Contractors, Incorporated has violated K.A.R. 28-50-9(c)(4), (c)(7) and (a)(9), hereby assesses MPM Contractors, Incorporated a

fine of \$3,000. Such fine shall be made payable in the form of a check or money order, to the Kansas Department of Health and Environment, and sent to the Asbestos Control Program, Kansas Department of Health and Environment, Topeka, Kansas 66620-7430.

### APPEAL RIGHT

If MPM Contractors, Incorporated is of the opinion that this Order is unlawful or unreasonable, it may, in accordance with the Kansas Administrative Procedures Act, appeal this Order by stating specifically in what way this Order is unlawful or unreasonable and sending its Notice of Appeal and request for a hearing to the Secretary of Health and Environment, Forbes Field, Building 740, Topeka, Kansas 66620. Said Notice must be made within 15 days from the date MPM Contractors, Incorporated receives this Order. Failure to submit a timely request will result in a waiver of the Contractor's right to a hearing and this ORDER ASSESSING A CIVIL PENALTY will become a Final Order assessing the civil penalty of \$3,000.00.

If a timely request for a hearing is made, Jack Alexander, Kansas Department of Health and Environment, Forbes Field, Building 740, Topeka, Kansas 66620, (913) 296-5513 is hereby appointed presiding officer to conduct such adjudicative proceedings.

Dated this 30th day of October, 1987.

/s/ Stanley C. Grant, Ph.D.,  
Stanley C. Grant, Ph.D.,  
Secretary  
Kansas Department of Health  
and Environment

CERTIFICATE OF MAILING

The undersigned hereby certifies that she placed in the mail a copy of the above and foregoing order on the 2nd day of November, 1987, addressed to Mary McGill, President, MPM Contractors, Incorporated, 215 South Pattie, Wichita, Kansas 67201 by certified mail, return receipt requested, postage prepaid in the U.S. Mail.

/s/ Wilma Stadler  
Staff Member

P 659 740 861  
Certified Mail Number

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**APPENDIX D**  
**IN THE DISTRICT COURT OF SHAWNEE COUNTY**  
**DIVISION 2**

MPM CONTRACTORS, INC.,

Petitioner,

v.

DEPARTMENT OF HEALTH  
AND ENVIRONMENT OF THE  
STATE OF KANSAS

Respondent

Consolidated  
Cases

Nos. 88 CV 1046  
88 CV 1238  
88 CV 1470  
88 CV 1736

**STIPULATIONS**

1. Stanley C. Grant, Ph.D., Secretary, Kansas Department of Health and Environment, signed three documents entitled "ORDER ASSESSING A CIVIL PENALTY", dated October 30, 1987 in 88 CV 1046, dated October 13, 1987 in 88 CV 1238, and dated October 30, 1987 in 88 CV 1470 respectively.

2. The Secretary provided no notice or opportunity for hearing to Petitioner prior to signing and issuing the above referenced documents.

3. The Secretary did not personally review the relevant agency administrative files and records upon which the above referenced documents were based prior to signing and issuing these documents.

4. In each case, the Secretary issued a Final Order dated May 27, 1988 in 88 CV 1046, June 30, 1987 in 88 CV 1238 and August 8, 1988 in 88 CV 1470 and signed a Correction of Final Order on October 6, 1988 concerning 88 CV 1470, which is Case 88 CV 1736.

5. These consolidated cases concern three basic appeals, 88 CV 1046, 88 CV 1238 and 88 CV 1470. The Secretary issued a Correction of the Final Order in 88 CV 1470 after the appeal was filed. An additional appeal was filed by Petitioner because of the correction, 88 CV 1736. Case 88 CV 1470 and 88 CV 1736 are, therefore, appeals of the same basic matter.

6. The Secretary relied on the independent legal advice of his General Counsel, who reviewed the relevant administrative files, transcripts, exhibits and records and prepared the Final Orders and subsequent Correction of Final Order for the Secretary. The Secretary did not personally review the administrative files or records before signing the Final Orders and Correction of Final Order.

Adams, Jones Robinson and  
Malone, Chartered

By /s/ John S. Seeber  
John S. Seeber - #04785  
155 N. Market, Suite 600  
P. O. Box 1034  
Wichita, KS 67202  
(316) 265-8591 -

Kansas Department of Health and  
Environment

By /s/ Yvonne Anderson  
Yvonne Anderson -  
#12636  
Special Assistant Attor-  
ney  
Landon State Office Bldg.  
Suite 904  
Topeka, KS 66620  
(913) 296-1330

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**APPENDIX E**

**BEFORE THE KANSAS DEPARTMENT OF HEALTH  
AND ENVIRONMENT**

In the Matter of Violation of  
Asbestos Control Regulations by  
MPM Contractors, Incorporated  
Its Successors or Assigns,  
215 South Pattie  
Wichita, Kansas 67201

Case No. 87-E-83

**NOTICE OF HEARING**

(Pursuant to Kansas Administrative Procedure Act)

TO: MPM Contractors, Incorporated  
215 Pattie  
Wichita, Kansas 67211

Yvonne Anderson, Attorney  
Kansas Department of Health and Environment  
Suite 904, Landon State Office Building  
Topeka, Kansas 66620-0001

An Order Assessing a Civil Penalty against the above-captioned company was issued by Stanley C. Grant, Ph.D., Secretary, Kansas Department of Health and Environment on October 30, 1987. Said Order was based on violations of K.A.R. 28-50-9 subsections (c)(7), and (a)(9) as indicated by a copy of the Order Assessing a Civil Penalty, which is attached hereto, marked Exhibit "A", and by reference made a part hereof.

Before a final decision is made regarding the assessment of a \$3,000.00 civil penalty, the Company is offered an opportunity to be heard in a formal adjudicative proceeding pursuant to the Kansas Administrative Procedure Act.

The Company is hereby notified that:

1. A hearing regarding this matter will be held at 10:00 a.m., on Monday, February 15, 1988, in the Conference Room A, Building 740, Forbes Field, Kansas Department of Health and Environment, Topeka, Kansas. The Presiding Officer will be Jack Alexander, Kansas Department of Health and Environment Building 740, Forbes Field, Topeka, Kansas (913) 296-5513.
2. This proceeding is held under authority of K.S.A. 65-5314 and the Kansas Administrative Procedure Act (K.S.A. 1985 Supp. 77-501 et seq.). Jurisdiction of the Secretary of Health and Environment is conferred by K.S.A. 65-5314.
3. At said hearing the Company will be given an opportunity to be represented by legal counsel or to personally present evidence as to why the civil penalty should not be imposed.
4. The Company will have the opportunity to confront the State's witnesses and to cross examine them under oath.
5. No other parties have been notified of this hearing.
6. Yvonne Anderson, Attorney, Kansas Department of Health and Environment, Suite 904, Landon State Office Building, Topeka, Kansas 66620, telephone number (913) 296-1330, has been designated to appear as counsel for the Department.
7. The following persons have been designated to be witnesses for the Department:

Gary Miller  
Russell Brichacek  
Rakesh Mohan  
Kansas Department of Health  
and Environment  
Building 740, Forbes Field

Topeka, Kansas 66620  
(913) 296-1547

8. The issues to be decided in this administrative hearing is whether the violations contained in the attached Order Assessing a Civil Penalty are correctly stated facts that warrant the assessment of the \$3,000.00 civil penalty.
9. Should the Company fail to attend or participate in this hearing, the Company may be held in default under the Administrative Procedure Act and an Order may be issued assessing the \$3,000.00 civil penalty.

IT IS SO ORDERED.

Dated this 13th day of January, 1988.

/s/ Stanley C. Grant  
Stanley C. Grant, Ph.D.  
Secretary  
Kansas Department of  
Health and Environment  
Building 740, Forbes Field  
Topeka, Kansas 66620  
(913) 296-1522

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of January, 1988, a true and correct copy of the above and foregoing Order was placed in the U. S. Mail, postage prepaid certified, returned receipt requested, and addressed as follows:

MPM Contractors, Inc.  
215 Pattie  
Wichita, KS 67211



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and a copy was also hand delivered to the following:

Yvonne Anderson  
Attorney Kansas Department of Health and Environ-  
ment  
Suite 904, Landon State Office Building  
Topeka, Kansas 66620

/s/ Dora L White  
Staff Member

---

**APPENDIX F**

**BEFORE THE DEPARTMENT OF HEALTH  
AND ENVIRONMENT STATE OF KANSAS**

In the Matter of Violation of	)	
Asbestos Control Regulations By	)	
MPM Contractors, Incorporated	)	Case No.
Its Successors or Assigns	)	87-E-83
215 South Pattie	)	
Wichita, Kansas 67201	)	

**REPORT OF HEARING OFFICER**

TO: Michael P. McGill, General Manager  
MPM Contractors, Incorporated  
215 South Pattie  
Wichita, Kansas 67201

John S. Seeber, Attorney  
Jones, Robinson & Malone, Chartered  
Box 1034  
Wichita, Kansas 67201

Dr. Stanley C. Grant, Secretary  
Kansas Department of Health & Environment  
Forbes Field, Bldg. 740  
Topeka, Kansas 66620-0001

James A. Power, Jr., Director  
Division of Environment  
Kansas Department of Health & Environment  
Forbes Field, Bldg. 740  
Topeka, Kansas 66620-0001

Yvonne Anderson, Staff Attorney  
Kansas Department of Health & Environment  
Landon State Office Building  
900 S.W. Jackson, Suite 904  
Topeka, Kansas 66612-1290

This case went to Administrative Hearing on the 15th  
day of February, 1988, at 10:00 a.m., in Conference Room

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A, Building 740, Forbes Field, Topeka, Kansas 66620, pursuant to notice.

The Kansas Department of Health and Environment (KDHE) appears by Ms. Yvonne Anderson, Staff Attorney for KDHE, Landon State Office Building, 900 S.W. Jackson, Suite 904, Topeka, Kansas 66620.

The Respondent appears by John S. Seeber, Attorney at Law, with the firm of Jones, Robinson & Malone, Chartered, Box 1034, Wichita, Kansas 67201.

Molly K. Dierking, Certified Shorthand Reporter from the Waters Court Reporting Service, 3601 S.W. 29th Street, Topeka, Kansas 66614, recorded the eighty-eight (88) pages of testimony and marked fourteen (14) State exhibits, and three (3) Appellant exhibits.

After hearing testimony, review of exhibits and transcript, the Hearing Officer sets forth this Summary of Evidence, Finding of Fact, Conclusions of Law, and issues this initial order.

### SUMMARY OF EVIDENCE

The first order of business was a motion to dismiss contained in Appellant Exhibit A offered by Attorney Seeber.

This motion was denied at this time by the Hearing Officer and would be accepted after completing his opening statement.

The Hearing Officer's opening statement was concluded with the statement "The issues to be decided in

this administrative hearing or whether the violations contained in the administrative order assessing the civil penalty are correctly stated facts that warrant the assessment."

Attorney Anderson gave her opening statements and offered three state witnesses and marked fourteen (14) state exhibits. The Respondent's attorney, Mr. Seeber, had no objections to Attorney Anderson's opening statement or the marking of exhibits.

Attorney Anderson stated the parties had agreed to stipulate that facts contained in Exhibits 5, 8, and 11, which are analytical analyses of samples collected during the compliance inspection, are true and representative of the evidence.

Attorney Anderson then reserved the need to recall witness Gary Miller later in the hearing, if needed, and he would also be available for examination by the Respondent's attorney.

Mr. Seeber was in agreement and further stated that he too may wish to later call someone back for examination.

Attorney Anderson continued with her statement outlining the alleged violations and stating those regulations and statutes that were affected by the charges.

She named her witnesses and outlined what they would be testifying to, then concluded by stating that the civil penalty should be upheld.

Mr. Seeber stated he would reserve his comments until after examination of the State witnesses. Again, he emphasized that he would like the record to show that

Appellant Exhibit A was offered and received before the hearing commenced.

At this point, Attorney Anderson requested time to make a comment in regard to Exhibit A.

Permission was granted. Attorney Anderson addressed the issues and concerns raised in Appellant Exhibit A.

Mr. Seeber requested to now put a brief statement on the record.

Permission was granted. Attorney Seeber then explained what he had stated in Exhibit A concerning the illegal conduct, in his opinion, of this administrative hearing.

The Hearing Officer explained again the issues in front of him at this particular administrative hearing.

Attorney Anderson now called her first witness, Mr. Gary D. Miller.

Mr. Miller after testifying to his experience and position with KDHE, stated that one of his functions is keeper of the department records.

Attorney Anderson further questioned Mr. Miller concerning State Exhibits #1 and #2.

Attorney Anderson concluded her examination of Mr. Miller with the condition of re-call later for additional testimony.

Mr. Seeber having no cross-examination questions concerning what Mr. Miller had testified to so far, reserved his right to examine Mr. Miller on re-call.

Mr. Russell H. Brichacek was the next State witness.

Attorney Anderson questioned this witness concerning his job description, his job duties and experiences.

At this point, Attorney Anderson questioned Mr. Brichacek concerning his involvement with the Quivira Heights Elementary School project.

Mr. Brichacek had been the inspector on this project and related his findings and actions.

Attorney Seeber began his cross-examination of Mr. Brichacek, he questioned the witness concerning his previous testimony.

Attorney Seeber had questions of this witness relating to his actions after performing his inspection.

Attorney Seeber questioned the witness concerning actions taken after he return to his office, meetings, and conversations leading up to the writing of the administrative order signed by Secretary Grant.

On redirect examination, Attorney Anderson had Witness Brichacek address his responsibilities to EPA concerning NESHAAP regulations, and his statement to the Respondent concerning the possibility of a citation being issued as the results of his findings during this inspection.

Attorney Seeber under recross-examination of Mr. Brichacek questioned the issue concerning the tunnel and the tape that was found on the air handling unit.

Witness Gary Miller was recalled to give additional testimony.

As Attorney Anderson continued her direct examination of Mr. Miller, it covered his knowledge and actions relating to the order filed in this case.

During this continued direct examination, Attorney Seeber did object to the materiality of one of the questions. This objection was noted but the witness was permitted to answer.

Attorney Seeber started his cross-examination of Mr. Miller by requesting to review the department official file.

Attorney Seeber requested that the administrative file be marked as Appellant Exhibit B.

Attorney Anderson objected, and it was agreed by Attorney Seeber that a copy of the original file could be immediately made and entered as Appellant Exhibit B.

At this time, Attorney Anderson finished her case and Attorney Seeber called his first witness, Mr. Mike McGill.

Under direct examination concerning the project, Witness McGill testified that MPM Contractors were still working on the site, in that the firm had not completed the reinsulation work.

Mr. McGill further testified concerning the expertise of two of his inspectors and the architectural firm that all performed inspections prior to the one conducted by State personnel.

Mr. McGill further testified it was the State that mentioned some additional work that needed to be addressed on this project, and that MPM accomplished the work

which was outside of the specifications of their contract and was not paid for the additional work.

Attorney Seeber questioned Mr. McGill concerning the issue of the tape that was allegedly attached somewhere to the boiler unit.

Mr. McGill responded that this issue had been resolved by his personnel.

Attorney Anderson in the cross-examination of Witness McGill questioned him concerning the date he allegedly was at the removal site, also his interpretation of the Kansas regulations under which the project was being accomplished. She then question Mr. McGill concerning whether the work in the tunnel had been completed prior to August 21, 1987, the day of the compliance inspection.

After this examination, Attorney Anderson and Attorney Seeber made their closing statements.

#### FINDINGS OF FACT

1. MPM, Incorporated, possesses asbestos control license #OA103, which authorizes said company to remove or encapsulate friable asbestos containing materials within the State of Kansas.
2. The effective date for this license is February 10, 1987, expiring on February 13, 1988.
3. On August 21, 1987, at the time of the alleged violation, this license was current and held by the Respondent.
4. On July 1, 1987, the State received from the Respondent their notification document for a proposed



asbestos abatement project at Quivira Heights Elementary School, Holyrood, Kansas.

5. In this notification document, the Respondent indicated they would use KAR 28-50-9(a) and 28-50-9(c). No waivers of work practices were requested or granted.
6. The Respondent, in his notification, indicated that work on this project would start July 18, 1987, and estimated completion would be August 1, 1987.
7. On August 21, 1987, Russell L. Brichacek, Asbestos Control Technician with Kansas Department of Health and Environment, conducted a compliance inspection at the Quivira Heights Elementary School, Holyrood, Kansas.
8. Mr. Brichacek testified that when he arrived at the project site, no work was in progress and school officials indicated to the best of their knowledge, work on the project was completed.
9. Other factors supporting those opinions were no visible signage or restrictive barriers in or near the project site.
10. On the afternoon of August 22, 1987, Inspector Brichacek contacted MPM, Inc. and spoke with Eric Pollitt concerning what he observed at the project. Mr. Pollitt informed Mr. Brichacek after the conversation that he would get a crew to the project site and take care of it. Inspector Brichacek also informed Mr. Pollitt that an enforcement action may, in his opinion, follow this notification.
11. A former KDHE inspector, Robert Williams, did a follow-up inspection on this project on August 27, 1987, and found other than some tape still on the air handling unit. Everything else had been taken care of.
12. Mr. Brichacek took photographs and collected samples from the top of the shorter set of lockers in the boys locker room. He did the same on a pipe near a

wall entry in the shower area also in the boys locker room.

13. Mr. Brichacek labeled and logged samples and delivered same to the department laboratory for analysis.
14. Under cross-examination by Attorney Seeber, Mr. Brichacek testified that he had not conducted the follow-up inspection, but that he understood the area was free and clean when this inspection was made.
15. This compliance inspection conducted by Mr. Brichacek was also a NESHAP inspection project relative to size for EPA purposes.
16. Mr. Brichacek was requested by Attorney Seeber to outline his involvement after the inspection leading up to the issuing of the administrative order.
17. Mr. Brichacek reported his findings to his immediate supervisor then they met with their section chief.
18. Gary Miller was the drafter of the proposed order.
19. The proposed order and the administrative file then were reviewed by the section chief, John Irwin, the same information then was reviewed by Bureau Manager Dave Romano.
20. The order then went to the KDHE legal department, after their review and sign-off it proceeds to the Director of the Division of Environment.
21. The Secretary of KDHE has the last review and makes the final decision as to sign and issue the order.
22. Gary Miller, having used the entire file in preparing the draft order, Attorney Seeber requested this file and later it was determined that a copy of the file would be marked as Appellant Exhibit B. One memo was pulled from this file and entered as Appellant Exhibit C.
23. While under examination by Attorney Seeber, Mike McGill testified that three persons associated with his firm performed inspections on this particular project.

24. Those persons by name were Max Bishop, Architect; Scott Lodico and Greg Truby both MPM supervisors, as well as Mike McGill, C.E.O. of MPM.
25. Mike McGill was the only person from this group that had inspected the project to appear and testify at this hearing.
26. By his own testimony, Mike McGill inspected the project approximately a week after the August 21, 1987, date when the compliance inspection had been conducted.
27. Mr. Truby was given time off in August by MPM to appear at a hearing conducted by the State of Kansas dealing specifically with quality of work at a job site.

#### CONCLUSIONS OF LAW

K.S.A. 65-5314:

- (a) Any business entity which violates any provision of this act or any rules and regulations adopted under this act, in addition to any other penalty provided by law, may incur a civil penalty imposed under subsection (b) in an amount not exceed \$5,000 for each violation and, in the case of a continuing violation, every day such violation continues shall be deemed a separate violation.
- (b) The secretary, upon a finding that a business entity has violated any provision of this act or any rules and regulations adopted under this act, may impose a civil penalty within the limits provided in this section upon such business entity, which civil penalty shall be in an amount to constitute an actual and substantial economic deterrent to the violation for which the civil penalty is assessed.
- (c) No civil penalty shall be imposed under this section except upon the written Order of the secretary after notification and hearing, if a hearing is requested, in accordance with the provisions of the Kansas administrative procedure act.

- (d) Any business entity aggrieved by an order of the secretary made under this section may appeal such order to the district court in the manner provided by the act for judicial review and civil enforcement of agency actions. An appeal to the district court or to an appellant court shall not stay the payment of the civil penalty. If the court sustains the appeal, the secretary shall refund forthwith the payment of any civil penalty to the business entity with interest at the rate established by K.S.A. 16204, and amendments thereto, from the date of payment of the penalty.
- (e) Any penalty recovered pursuant to the provisions of this section shall be remitted to the state treasurer, deposited in the state treasury and credited to the state general fund.

K.A.R. 28-50-9. Work practices for asbestos removal projects in areas to be reoccupied. (a) An asbestos removal project that involves the removal of friable asbestos containing materials from structural items or equipment that are located in any enclosed area which can be expected to subsequently be occupied by persons other than maintenance or equipment operating personnel, or in an area that is only directly assessable from these areas, shall be conducted in accordance with the following requirements:

- (g) After the plastic sheeting has been removed, all previously covered surfaces in the work area shall be cleaned free of all visible debris with a HEPA filter equipped vacuuming device or by wet cleaning methods. Not less than 24 hours after this cleanup, an air stream from a high speed leaf blower or equivalent device shall be swept across all clean surfaces for a period of not less than five minutes for each 1000 square feet or surface area.

K.A.R. 28-50-9(c)(4). Glove bags shall be sealed to pipe or conduit in a manner that provides an airtight seal around the area from which the asbestos is to be removed unless the air space within the bag is maintained at a lower air pressure than the air outside of the bag. Airtight seals shall be continuously maintained until the pipe or conduit surface that is enclosed within the glove bag has been cleaned free of all visible residue.

K.A.R. 28-50-9(c)(7). At the completion of the project and before the warning signs required by subsection (c)(2) are removed and the area can be reoccupied by persons other than those having responsibilities directly related to the project, the work area shall be free of all visible asbestos containing debris, including accumulations that existed prior to the start of the project.

## ORDER

Testimony and exhibits presented as evidence at the Administrative Hearing of Case #87-E-83 held February 15, 1988, confirmed that MPM Contractors, Inc., and/or their agents were in fact in violation of KAR 28-50-9(a)(9), 28-50-9(c)(4) and (c)(7). These work practice violations pursuant to KSA 65-5314, allow for the secretary to assess a civil penalty of up to five thousand dollars (\$5,000) for each violation and every day such violation continues shall be deemed a separate violation. Therefore, the assessment of a civil penalty in this case is fair and appropriate. The Hearing Officer takes notice of the Kansas Department of Health and Environment Toxicology Section guidelines for assessing administrative fines, and that the fine of five hundred dollars (\$500) per violation

is the minimum suggested fine allowable under these guidelines.

It is therefore ordered by the Hearing Officer that the civil penalty in the amount of three thousand dollars (\$3,000) imposed against MPM Contractors, Inc., is hereby sustained and that this amount be paid in the form of a cashiers check or money order to the Kansas Department of Health and Environment Toxicology Section Forbes Field, Topeka, Kansas 66620. The Hearing Officer gives notice to the Respondent in this Case (87-E-83) that this initial order shall become a final order thirty (30) days after service unless procedures are initiated for seeking reconsideration or other administrative reliefs. The available procedures and time limitations for seeking reconsideration or other administrative relief are as follows:

1. A petition for review of an initial order must be filed with the secretary of Health and Environment within fifteen (15) days after service of the initial order. The petition shall state its basis.
2. A party may submit to the Hearing Officer or the secretary of Health and Environment a petition for stay of effectiveness of an initial order or final order until the time at which a petition for judicial review would no longer be timely, unless otherwise provided by statute or stated in the initial or final order.
3. Any party, within fifteen (15) days after service of a final order, may file a petition or reconsideration with the secretary of Health and Environment, stating the specific grounds upon which relief is requested. The filing of the petition is not a pre-requisite for seeking administrative or judicial review. The Respondent has the right to appeal to the District Court in accordance with the act for the judicial review and civil enforcement of agency actions.



Dated this 10th day of May, 1988.

/s/ Jack Alexander  
Jack Alexander, Hearing  
Officer  
Dept. of Health &  
Environment  
Forbes Field, Bldg. 740  
Topeka, Kansas 66620-7300  
913/296-5513

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of May, 1988, a true and correct copy of the above foregoing document was placed in the U. S. Mail, postage prepaid, certified, return receipt requested, and addressed as follows:

Michael P. McGill, General Manager  
MPM Contractors, Incorporated  
215 South Pattie  
Wichita, Kansas 67201

/s/ Jeanne A. Woodard  
Staff Member

Certified Mail No. 291 210 101  
jaw

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APPENDIX G

STATE OF KANSAS  
KANSAS DEPARTMENT OF HEALTH  
AND ENVIRONMENT

In the Matter of Violation of  
Asbestos Control Regulations  
by  
MPM Contractors, Incorporated  
Its Successors or Assigns,  
215 South Pattie  
Wichita, KS. 67201

Case No. 87-E-83

FINAL ORDER

The Secretary of Health and Environment, after reviewing the above captioned file, the hearing transcript and the appeal filed herein, and being duly advised in the premises, finds as follows:

1. The Respondent has challenged the administrative hearing process used in the above captioned case alleging that there was a violation of the Respondents due process rights to Notice of Hearing and a Hearing. The Hearing in this case was conducted pursuant to the Kansas Administrative Procedure Act (K.S.A. 1987 Supp. 77-501 et seq.) The Asbestos Control Act (K.S.A. 65-5301 et seq.) provides for the imposition of a civil penalty by the Secretary upon a finding that there has been a violation of the act or the rules and regulations promulgated pursuant to the act. K.S.A. 65-5314(c) specifically provides as follows:

No civil penalty shall be imposed under the section except upon the written order of the secretary after notification and hearing, *if a hearing is requested*, in accordance with the provisions of the



Kansas administrative procedure act.  
(Emphasis supplied)

Reading the "Order Assessing a Civil Penalty" as a whole, it is clear that a right to a hearing upon the request of the Respondent is preserved. No penalty was "imposed" by that order because it was by its own terms, not final until after the time for the appeal had expired. MPM requested a hearing in a timely manner. MPM Contractors, Incorporated was given full opportunity for a hearing before an appropriate hearing officer pursuant to the KAPA.

The order in this case was drafted so that no further action was required by the agency if MPM Contractors, Incorporated did not avail itself of its rights to a hearing. The argument advanced by MPM Contractors, Incorporated to the affect that there was no opportunity for a hearing is clearly meritless.

The recent Kansas case styled *Pork Motel vs. the Kansas Department of Health and Environment*, 234 Kan. 374, 673 P.2d 1126 (1983), addresses MPM's claim that Jack Alexander is a captive employee of KDHE and therefore an improper hearing officer. That case held that an administrative agency may perform both investigation and adjudicatory functions so long as the chain of command for each such function reaches the Secretary through different channels. There is no proof, or even an allegation that the rule of law as set out in *Pork Motel*, supra has been violated. The Kansas Administrative Procedure Act provides for disqualification of a hearing officer upon a showing of administrative bias (K.S.A. 1987 Supp. 77-514(b)). No petition for disqualification was ever filed and there has been no evidence presented which would tend to show that administrative bias exists in this case. MPM is therefore

estopped from raising this defense at this late date.

2. A review of the record shows that there is ample evidence to support the findings of fact and conclusions of law of the hearing officer in this case.
3. MPM alleges that there had never been a hearing before the Secretary and that no oral argument is being permitted by the Secretary on MPM's Petition for Review. The Kansas Administrative Procedures Act, at K.S.A. 77-527(e), provides that oral arguments are discretionary with the Secretary. The KAPA is designed to afford the respondent its due process rights. All of its requirements have been fully met in this case.
4. The penalty imposed in this case is well below the statutory maximum. It is designed to provide a "*substantial* economic deterrent" to the activity engaged in by the Respondent in this case (K.S.A. 65-5314(b)). The amount of the penalty is fair and reasonable under all the facts and circumstances.
5. The balance of the issues raised by counsel for MPM have been reviewed and in light of the findings hereinabove it is clear that they have no merit.
6. The report of Hearing Officer in the above captioned case, is incorporated herein by reference as findings of fact and conclusions of law.

IT IS THEREFORE BY THE SECRETARY ORDERED, AND DECREED that the Initial Order is hereby adopted and approved and that the civil penalty of \$4,000 imposed by said Initial Order is adopted by the Secretary of Health and Environment.

The available procedures and time limitations for seeking reconsideration or other relief are as follows:

1. Any party, within fifteen days after service of a final order, may file a petition for reconsideration

with the Secretary of Health and Environment, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review.

2. The licensee has the right to appeal to the District Court in accordance with the act for the judicial review and civil enforcement of agency actions (K.S.A. 77-601 et seq.) by filing a Petition for Review within 30 days after service of the Order, pursuant to K.S.A. 77-613.

IT IS SO ORDERED.

Dated this 8 day of August, 1988.

/s/ Stanley C. Grant  
Stanley C. Grant, Ph.D.  
Secretary of Health and  
Environment

#### CERTIFICATE OF MAILING

I hereby certify on the 8th day of August, 1988, a true and correct copy of this document was deposited in the U.S. Mail and postage prepaid and addressed as follows:

Michael P. McGill  
MPM Contractors, Inc.  
215 S. Pattie  
Wichita, Kansas 67201

John S. Seeber  
Adams, Jones, Robertson and Malone Chartered  
Attorney at Law  
P.O. Box 1034  
Wichita, Kansas 67201-1034

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and a copy was hand delivered to Yvonne Anderson, Attorney, Kansas Department of Health and Environment, Suite 904, Landon State Office Building, Topeka, Kansas 66612-1290.

/s/ C.A. Houghton  
Staff Member

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APPENDIX H

KANSAS DEPARTMENT OF HEALTH  
AND ENVIRONMENT

In the Matter of Violation of  
Asbestos Control Regulations                      Case  
by MPM Contractors, Incorporated              No. 87-E-83  
Its Successors or Assigns,  
215 South Pattie  
Wichita, Kansas 67201

CORRECTION OF FINAL ORDER

The Secretary of Health and Environment, after reviewing the Final Order issued in August 8, 1988, in Case No. 87-E-83 takes notice of a typographical error and issues this order to correct such error.

Page 3 of the Final Order reads, in pertinent part, as follows:

"IT IS THEREFORE BY THE SECRETARY ORDERED, AND DECREED that the Initial Order is hereby adopted and approved and that the civil penalty of \$4,000 imposed by said Initial Order is adopted by the Secretary of Health and Environment." (Emphasis added.)

The paragraph is amended to read as follows:

"IT IS THEREFORE BY THE SECRETARY ORDERED, AND DECREED that the Initial Order is hereby adopted and approved and that the civil penalty of \$3,000 imposed by said Initial Order is adopted by the Secretary of Health and Environment." (Emphasis added.)

The remainder of the Final Order issued in Case No. 87-E-83 is hereby incorporated by reference and reaffirmed.

IT IS SO ORDERED.

Dated this 6th day of October, 1988.

/s/ Daniel M. Faste Jr.  
Stanley C. Grant, Ph.D.  
Secretary  
Kansas Department of  
Health and Environment

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing has this 6th day of October, 1988, been served upon the following by U. S. Mail, postage prepaid and addressed as follows:

Michael P. McGill  
MPM Contractors, Inc.  
215 S. Pattie  
Wichita, KS 67201

John S. Seeber,  
Attorney at Law  
P. O. Box 1034  
Wichita, KS 67201-1034

and a copy was hand delivered to

Yvonne Anderson  
Attorney  
Kansas Department of Health and Environment  
Suite 904, Landon State Office Building  
Topeka, KS 66612-1290

/s/ Sandra McAdam  
Staff Member

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**APPENDIX I**  
**IN THE DISTRICT COURT**  
**OF SHAWNEE COUNTY, KANSAS**

MPM CONTRACTORS, INC.,	)	
	)	Case
Petitioner,	)	No. 88 CV 1470
	)	
v.	)	Div 2
	)	
DEPARTMENT OF HEALTH	)	
AND ENVIRONMENT of the	)	
State of Kansas,	)	
	)	
Respondent.	)	
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**PETITION FOR JUDICIAL REVIEW**

COMES NOW the petitioner, MPM Contractors, Inc. (herein called "MPM"), 215 South Pattie, Wichita, Kansas 67201 and files this Petition For Judicial Review against the respondent, Department of Health and Environment of the State of Kansas, whose mailing address is Forbes Field, Building 740, Topeka, Kansas 66620.

1. The agency action at issue in this Petition For Judicial Review is the Final Order in Case No. 87-E-73 of Stanley C. Grant, Ph.D., Secretary of Health and Environment dated August 8, 1988, a copy of which is attached hereto as Exhibit A and made a part hereof the same as if set forth in full herein, whereby a fine was levied under the Asbestos Control Act, K.S.A. 65-5301 *et seq.* of \$4,000.00 against petitioner and prior agency action in this matter.

\* \* \*

4. . . . Said penalty imposed also violates the Bill of Rights of the Constitution of the State of Kansas, Section

10; violates the Fifth and Fourteenth Amendments to the Constitution of the United States . . .

\* \* \*

7. . . . The proceedings before Jack Alexander and Exhibit D were null and void and in violation of the above constitutional provisions and Kansas statutes and a deprivation of MPM's rights thereunder and under the Fifth and Fourteenth Amendments to the United States Constitution by the deprivation of life, liberty or property without due process of law and a denial of a remedy by due course of law under Section 18 of the Bill of Rights to the Kansas Constitution; in violation of Section 10 of the Bill of Rights to the Kansas Constitution, and a denial of a due process of law hearing. In its totality, all of the procedures were a denial of a lawful procedure under the enabling statute, K.S.A. 65-5314. A due process hearing in violation of the above statutes and constitutional sections was also denied because there was a predetermination by the Secretary in Exhibit B on October 30, 1987 without a hearing and the hearing before Jack Alexander, a subordinate of the Secretary and dependent upon his position on such Secretary, was a sham and the matter prejudged and predetermined and set in concrete by Exhibit B before there was any attempt at giving any kind of hearing to MPM.

\* \* \*



Respectfully submitted,

ADAMS, JONES, ROBINSON  
AND MALONE, CHARTERED

By /s/ John S. Seeber  
John S. Seeber, Attorneys  
for MPM Contractors, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing Petition For Judicial Review was served upon the defendant and respondent by mailing a copy thereof, postage prepaid, on this 6th day of September, 1988, addressed to:

Dr. Stanley, C. Grant, Ph.D.  
Secretary Of Health and Environment  
agency head, Department of Health  
and Environment of the State of Kansas  
Forbes Field, Bldg. 740  
Topeka, Kansas 66620

Ms. Yvonne Anderson  
Staff Attorney  
Department Of Health and  
Environment of the State of Kansas  
Landon State Office Building  
Suite 904  
Topeka, Kansas 66620

/s/ John S. Seeber  
John S. Seeber

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**APPENDIX J**  
**IN THE DISTRICT COURT OF**  
**SHAWNEE COUNTY, KANSAS**  
**SECOND DIVISION**

MPM CONTRACTORS, INC.,	)	
	)	Case
Petitioner,	)	Nos. 88-CV-1046
	)	88-CV-1238
vs.	)	88-CV-1470
DEPARTMENT OF HEALTH	)	88-CV-1736
AND ENVIRONMENT OF THE	)	
STATE OF KANSAS,	)	
	)	
Respondent.	)	

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**MEMORANDUM DECISION AND ORDER**

This case comes before the Court on an appeal from decisions by the Kansas Department of Health and Environment (KDHE) imposing civil penalties in each of the consolidated cases for violations by MPM Contractors (MPM) of the Asbestos Control Act, K.S.A. 65-5301, et seq.

Each case, consolidated for the purpose of this appeal, represents violations purportedly found in three separate asbestos removal projects conducted by MPM. Each project was inspected by KDHE staff members who prepared recommendations for the imposition of civil penalties against MPM. These were submitted to the Secretary of KDHE as an "ORDER ASSESSING A CIVIL PENALTY" for each case. These were subsequently signed by Stanley C. Grant, Ph.D., Secretary of KDHE. The "ORDERS" assessed penalties of \$2,000 (88-CV-1046),

\$4,000 (88-CV-1238) and \$3,000 (88-CV-1470). The civil penalties are authorized by K.S.A. 65-5314.

Each Order provided for an appeal and hearing, if requested by MPM, before the penalties became final. MPM requested and was granted a hearing in each of the cases. The Hearing Officer, Jack Alexander, a KDHE employee, upheld the imposition of the civil penalties in each case. MPM appeals on several grounds. First, it contends that the civil penalties are unconstitutional because they constitute criminal penalties or punitive damages. Secondly, MPM contends denial of due process by the appointment of Jack Alexander, KDHE employee, as Hearing Officer. Finally, MPM alleges that KDHE violated the statute requiring notice and hearing before imposition of the civil penalties.

#### FINDINGS OF FACT

1. Stanley C. Grant, Ph.D., Secretary, Kansas Department of Health and Environment, signed three documents entitled "ORDERED ASSESSING A CIVIL PENALTY," dated October 30, 1987 in 88-CV-1046, dated October 13, 1987 in 88-CV-1238, and dated October 30, 1987 in 88-CV-1470, respectively.

2. The Secretary provided no notice or opportunity for hearing to petitioner prior to signing and issuing the above referenced documents.

3. The amount of each civil penalty was established by the "ORDER ASSESSING A CIVIL PENALTY."

4. A hearing in the form of an appeal from the civil penalty was allowed and undertaken in each case.

5. In each case, the Secretary issued a Final Order dated May 27, 1988 in 88-CV-1046, June 30, 1988 in 88-CV-1238 and August 8, 1988 in 88-CV-1470 and signed a Correction of Final Order on October 6, 1988 concerning 88-CV-1470, which is case 88-CV-1736.

6. Each Final Order upheld the amount of the civil penalty assessed in the original Orders.

### CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court makes the following conclusions of law:

1. The Court finds that the civil penalties authorized by K.S.A. 65-5314 in an amount sufficient to be an "actual and substantial economic deterrent" do not constitute either punitive damage or criminal penalties.

2. The appointment of Jack Alexander, a KDHE employee, as Hearing Officer did not violate petitioner's due process right to a hearing before an impartial examiner.

3. The Court further finds that the civil penalties assessed by KDHE were imposed without notification and hearing contrary to the provisions of K.S.A. 65-5314 and 77-508.

4. The Final Orders assessing civil penalties in each of the consolidated cases are hereby set aside and no further agency action shall be taken in regard to these alleged violations of the Asbestos Control Act.

## RATIONALE

The Court, in reviewing the actions of an administrative agency, is limited to considering whether, as a matter of law, (1) the agency acted fraudulently, arbitrarily or capriciously, (2) the administrative order is substantially supported by the evidence, and (3) the agency's action was within the scope of its authority. *Hemry v. State Board of Pharmacy*, 232 Kan. 83, 652 P.2d 670 (1982). In this case, the Court is concerned with whether KDHE acted within the scope of its authority in imposing civil penalties against MPM for violations of the Asbestos Control Act, K.S.A. 65-5301, et seq.

The petitioner first raises the issue of the constitutionality of the civil penalties authorized by K.S.A. 65-5314. It is well-settled in the law that a statute is presumed to be constitution. See *Federal Land Bank of Wichita v. Bott*, 240 Kan. 624, 732 P.2d 710 (1987). Petitioner alleges that the civil penalties authorized by the statute are in the nature of punitive damages and/or criminal penalties. This challenge has not been specifically addressed in Kansas.

The Legislature has specifically authorized KDHE to impose civil penalties "in an amount to constitute an actual and substantial economic deterrent. . . ." The statute specifies that the penalty have a deterrent effect, which implies deterring future conduct as opposed to punishing past acts. The Legislature obviously sought to prevent future violations of the Asbestos Control Act by allowing penalties to be assessed. No finding of wanton, fraudulent, malicious, or grossly negligent conduct is necessary as would be required for the assessment of

punitive damages. *Tetuan v. A. H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987). Further, *Woods v. Midwest Conveyor Co.*, 231 Kan. 763, 648 P.2d 234 (1982) does not control here. In *Woods*, the agency awarded damages for pain, suffering, and humiliation, which the Court held was akin to punitive damages and outside the scope of the agency's authority. KDHE did not award damages to any entity for any of the reasons addressed in *Woods*.

The civil penalty authorized by the statute is not in the nature of a criminal penalty. Procedural safeguards of notice and a hearing are provided by the statute and the entity being penalized bears no risk of incurring incarceration or a criminal record. For the violation to be criminal, it must be willful and the Legislature addressed this in a separate statute. See K.S.A. 65-5313. Because the civil penalties do not constitute punitive damages or criminal penalties and because the Legislature, through the enabling statute, gave KDHE the authority to issue these penalties, KDHE acted within the scope of its authority. This Court perceives no separation of powers problem in the imposition of civil penalties by KDHE under K.S.A. 65-5314 and the presumption of constitutionality is not overcome.

The petitioner also raises as improper, the appointment of Jack Alexander, a KDHE employee, as Hearing Officer. The Kansas Administrative Procedure Act (KAPA) does not prohibit the presiding officer from being an employee of the agency taking the action. It does provide, however, for the disqualification of the Hearing Officer for bias, interest, or prejudice upon petition by any of the parties. K.S.A. 77-514. MPM did not petition for the disqualification of Jack Alexander.

The Kansas Supreme court addressed a similar issue in *Pork Motel Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, 673 P.2d 1126 (1983). That case was decided prior to the enactment of the KAPA, but cites with approval the reasoning of the United States Supreme Court that the "combination of investigating and judging functions in an agency does not violate due process." *Id.* at 383 (citing *Withrow v. Larkin*, 421 U.S. 35 (1975)). The Court in *Pork Motel* further noted that under the Administrative Procedure Act all that was required was that the investigator and the Hearing Officer be responsible to the agency head through a separate chain of authority. *Id.* at 383 (citing 5 U.S.C. Sec. 554(d) (1982)). Although there is no similar procedure in the KAPA, the separation of functions doctrine has been deemed to provide adequate due process protection and has been cited with approval by the Kansas Supreme Court in *Pork Motel*.

In the instant case, there is no evidence that Jack Alexander was involved in an investigative role for KDHE with MPM. According to the record, Mr. Alexander is an employee of KDHE and works in the Bureau of Water Protection, a separate department. He had no role in the MPM case until appointed Hearing Officer. There is no evidence that petitioner's due process rights were violated by Mr. Alexander presiding over the hearing.

The final issue raised by petitioner is the sufficiency of notice and hearing under K.S.A. 65-5314. The statute reads: "(c) No civil penalty shall be imposed under this section except upon the written order of the secretary after notification and hearing, if a hearing is requested, in



accordance with the provisions of the Kansas Administrative Procedures Act."

The procedure followed by KDHE began with an investigation of the asbestos removal sites controlled by MPM. The orders assessing the civil penalties were drafted and reviewed up the line by superiors at KDHE. Each Order named a fixed penalty amount and contained an appeal provision. In requesting an appeal, petitioner was required to state specifically how the Order was unlawful or unreasonable by sending a notice to the Secretary. The Secretary signed each Order. KDHE asserts that the Orders were not final pending the outcome of the appeal. Each Order was subsequently upheld by Jack Alexander, the presiding officer, and the civil penalties were sustained.

The question becomes, then, whether the appeal or hearing allowed by KDHE after the Orders are issued by the Secretary meet the requirement of notice and hearing before the imposition of the penalties. This Court is of the opinion it does not.

The statute clearly contemplates a hearing and notice, not an appeal procedure. The hearing conducted by KDHE required petitioner to show why it should not be assessed the penalty already imposed by the agency. At the conclusion of the proceeding, the penalties were sustained and the Orders became final. To call this a hearing and notice contemplated by the statute is clearly form over substance. The penalties were imposed by the signing of the Orders by the Secretary without notice to MPM or a hearing if MPM desired one. MPM had no



opportunity for the type of hearing participation provided in the KAPA prior to the penalties being imposed. The actions, by KDHE were clearly outside the scope of its authority as granted by the enabling statute, K.S.A. 65-5314.

This outcome is further dictated by the KAPA, which is incorporated by the enabling statute. Under K.S.A. 77-508, the adjudicative proceeding "*shall* be the process for formulating and issuing an order" unless some other criteria exist which are not pertinent here. This statute is dispositive of the question regarding the use of the hearing. It is to be conducted in such a way to allow for the formulation and issuing of the Order. In the instant case, the procedure was used to appeal the issuance of the Orders which assessed the penalty. It was not a process to determine whether the penalty should be imposed and, if so, in what amount. This was clearly in violation of K.S.A. 77-508. KDHE was without authority to impose civil penalties prior to MPM being provided notice and a hearing.

Pursuant to K.S.A. 77-622, the Court hereby sets aside the Final Orders issued by KDHE in each of the cases consolidated for the purpose of this appeal. Because the record reflects no ongoing violations in any of these cases, it is the opinion of this Court that justice will not be served through any additional agency action. KDHE failed to follow the statutory notice and hearing procedure and is hereby ordered to take no further action regarding these alleged violations of the Asbestos Control Act.

The original of this Memorandum Decision and Order is being filed with the Clerk and shall constitute the entry of the Court's judgment. No further Journal Entry is necessary.

Dated this 11th day of April, 1989.

/s/ Fred S. Jackson  
FRED S. JACKSON  
DISTRICT JUDGE

Copies mailed to:  
John S. Seeber, Esq.  
Ms. Yvonne Anderson

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**APPENDIX K**  
**IN THE DISTRICT COURT OF SHAWNEE COUNTY**  
**DIVISION 2**

MPM CONTRACTORS, INC.,	)	
	)	Consolidated
Petitioner,	)	Cases
v.	)	Nos. 88 CV 1046
	)	88 CV 1238
DEPARTMENT OF HEALTH AND	)	88 CV 1470
ENVIRONMENT OF THE STATE	)	88 CV 1736
OF KANSAS,	)	
	)	
Respondent.	)	
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**NOTICE OF CROSS-APPEAL**

Notice is hereby given that MPM Contractors, Inc., Petitioner, appeals from the April 11, 1989 Memorandum Decision and Order of the Honorable Fred S. Jackson in the above consolidated cases, 88 CV 1046, 88 CV 1238, 88 CV 1470, and 88 CV 1736 to the Court Of Appeals Of The State Of Kansas. The Petitioner appeals from the district court not including in its reasons for its finding in favor of MPM Contractors, Inc., that the acts of the agency violated the Fifth and Fourteenth Amendments to the Constitution of the United States, the Seventh Amendment to the Constitution of the United States, the Bill of Rights of the Constitution of the State of Kansas, and Sections 10 and 18 of the Bill of Rights to the Kansas Constitution.

Respectfully submitted,

ADAMS, JONES, ROBINSON  
AND MALONE, CHARTERED

By /s/ John S. Seeber  
John S. Seeber - 04785  
155 N. Market, Suite 600  
Post Office Box 1034  
Wichita, KS 67202  
(316) 265-8591

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 1989, the undersigned mailed, postage prepaid, a true and correct copy of the above and foregoing Notice, addressed to:

Ms. Yvonne Anderson  
Staff Attorney  
Landon State Office Building  
Suite 904  
Topeka, KS 66620

/s/ John S. Seeber  
John S. Seeber

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